

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

VISTOSO COMMUNITY ASSOCIATION,
Plaintiff/Appellant,

v.

LISA R. ANDRADE,
Defendant/Appellee.

No. 2 CA-CV 2018-0196
Filed September 18, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20184055
The Honorable Lee Ann Roads, Judge Pro Tempore

VACATED AND REMANDED

COUNSEL

Carpenter, Hazlewood, Delgado & Bolen LLP, Tucson
By Jason E. Smith and Kaycee S. Wamsley
Counsel for Plaintiff/Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which
Chief Judge Vásquez and Judge Brearcliffe concurred.

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ST A R I N G, Presiding Judge:

¶1 Vistoso Community Association (Vistoso) appeals the trial court's order entering default judgment and granting injunctive relief against Lisa Andrade, and awarding attorney fees and costs to Vistoso. It argues the court erred by *sua sponte* reducing the award of attorney fees to an amount less than that requested by Vistoso. For the reasons that follow, we vacate the court's award of attorney fees and remand for proceedings consistent with this decision.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling." *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2 (App. 2009). Vistoso is an Arizona nonprofit corporation whose members are homeowners within the Rancho Vistoso community in Pima County. The members are subject to Vistoso's Restated Declaration of Covenants, Conditions, Restrictions and Easements (CC & Rs). Andrade owns a home within the community and is therefore subject to the CC & Rs.

¶3 Vistoso sued Andrade for injunctive and monetary relief alleging she was violating the CC & Rs "by not maintaining the landscaping (weeds), backyard, or removing the tree/bush encroachment on [the] sidewalk." Vistoso also requested attorney fees. Andrade failed to answer or otherwise respond to Vistoso's complaint.

¶4 Vistoso moved to set a default hearing and requested attorney fees in the amount of \$5,130. It based its claim for attorney fees on Article VIII, Section 8.1.2 of the CC & Rs, which states: "[T]he costs and reasonable attorneys' fees, if any, incurred by the Association in connection with the enforcement and collection thereof or in otherwise enforcing this Declaration . . . shall be the personal obligation of the Owner of such Lot or Parcel." Vistoso filed a detailed affidavit based on its attorneys' billing records in support of its application. At the hearing, the trial court entered a default judgment against Andrade, granted Vistoso's request for injunctive relief, and awarded Vistoso its full costs and \$1,500 in attorney fees. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(b).

Discussion

¶5 As its sole issue on appeal, Vistoso argues the trial court erred by not awarding the full amount of attorney fees it had requested. Specifically, it argues the court had no discretion to reduce the requested attorney fees absent an objection by the opposing party or specific findings

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of a deficient fee application. Andrade failed to file a responsive brief. When an appellant raises a debatable issue in a civil case, we generally assume the appellee's failure to file an answering brief to be a confession of reversible error. See *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, ¶ 13 (App. 2007); *State v. Greenlee Cty. Justice Court*, 157 Ariz. 270, 271 (App. 1988). "It is, however, our duty to examine the record to determine whether there are debatable issues." *Air East, Inc. v. Wheatley*, 14 Ariz. App. 290, 292 (1971).

¶6 In this case, Vistoso submitted its fee application consistent with the requirements in *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187-89 (App. 1983), establishing prima facie entitlement to the requested attorney fees. See *McDowell*, 216 Ariz. 266, ¶ 20. Andrade did not object to the attorney fees requested and did not appear at any stage of the proceedings in superior court. Although the minute entry order issued following the default hearing states the court "ordered that the attorney's fees as testified to by [Vistoso] are reasonable," the court ultimately awarded only \$1,500; substantially less than the \$5,130 amount Vistoso requested.

¶7 The extent to which a trial court may review and reduce an unopposed fee request made pursuant to a contractual provision is a debatable issue. See *id.* ¶ 13. We therefore consider Andrade's failure to file an answering brief to be a confession of reversible error. See *id.* ¶ 20; *Greenlee*, 157 Ariz. at 271.

Disposition

¶8 For the foregoing reasons, we vacate that portion of the trial court's order granting a partial award of attorney fees and remand for proceedings consistent with this decision. Vistoso has also requested its attorney fees and costs on appeal, pursuant to the CC & Rs,¹ see A.R.S. §§ 12-341, 12-341.01(A), 33-1807(H), and Rule 25, Ariz. R. Civ. App. P. In our discretion, and in light of Andrade's confession of error, we deny Vistoso's request for attorney fees on appeal. See *Tucson Estates Prop. Owners Ass'n, Inc. v. McGovern*, 239 Ariz. 52, ¶ 21 (App. 2016) (court has discretion to deny attorney fees on appeal). However, Vistoso may recover taxable costs pursuant to § 12-341, upon its compliance with Rule 21(b), Ariz. R. Civ. App. P.

¹Vistoso failed to provide the cited provisions of the CC & Rs. See *Blair v. Burgener*, 226 Ariz. 213, ¶ 9 (App. 2010) (burden on appellant to provide all documents necessary for appellate court to consider issues).